Supreme Court, U.S.
FILED
APR 13 1998
CLERK

Nos. 97-1390, 125 Orig.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

THE REPUBLIC OF PARAGUAY *et al.*,
Petitioners and Plaintiffs,

— v. —

JAMES S. GILMORE III, Governor
of the Commonwealth of Virginia, *et al.*,
Respondents and Defendants.
(Additional parties listed inside front cover)

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT AND ON MOTION
FOR LEAVE TO FILE ORIGINAL COMPLAINT

REPLY TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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Dated: April 14, 1998

Additional Parties:

JORGE J. PRIETO, Ambassador of the Republic of Paraguay to the United States, and JOSÉ MARÍA GONZALEZ AVILA, Consul General of the Republic of Paraguay to the United States,

Petitioners and Plaintiffs,

MARK L. EARLY, Attorney General for the Commonwealth of Virginia; RONALD J. ANGELONE, Director of Corrections for the Commonwealth of Virginia; and DAVID A. GARRAGHTY, Warden, Greensville Correctional Facility, Jarratt, Virginia,

Respondents and Defendants.

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— v. —

JAMES S. GILMORE III, Governor of the Commonwealth of Virginia, MARK L. EARLY, Attorney General for the Commonwealth of Virginia; RONALD J. ANGELONE, Director of Corrections for the Commonwealth of Virginia; and DAVID A. GARRAGHTY, Warden, Greensville Correctional Facility, Jarratt, Virginia,
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As the Solicitor General's brief makes clear, this case is precisely the kind of case that this Court was created to decide. The International Court of Justice has ruled 15-0 that the United States should "take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision" in the proceedings instituted by Paraguay against the United States in that

Court. The United States advises the Court that the Secretary of State has told the Governor of the Commonwealth of Virginia that, in light of the ICJ Order, the "unique and difficult foreign policy issues" raised by the case, and "other problems created by the Court's provisional measures," the execution should be stayed. U.S. Br. at 46 & App. F.

According to the Solicitor General, however, "'measures at [the United States'] disposal' under our Constitution may in some cases include only persuasion." U.S. Br. at 51 (quoting ICJ Order; brackets in U.S. Br.). Hence, the Solicitor General advises that the Executive Branch is content to do no more than send the Secretary's letter, and then sit idly by while the Governor — who, the United States advises, turned down an earlier, similar request by the Secretary that could have avoided Paraguay's filing in the ICJ, U.S. Br. at 11 — determines whether he should adhere to the Secretary's new request. The Solicitor General invites the Court similarly to sit on the sidelines by denying Paraguay's requests for relief. Hence, according to the Solicitor General, the Governor of Virginia is now to determine whether the United States will comply with the ICJ Order.

In the face of the conflict in the Executive Branch, and the profound constitutional disorientation that would result if the question of compliance with an ICJ Order were left to the Governor of Virginia, this Court should grant the petition, the motion for leave to file the original complaint, and the accompanying motions for provisional relief, so that it may then decide, with both adequate time and adequate briefing, whether the United States will comply with or disregard the ICJ Order and the United States's obligations under the treaties involved in this case.

This Court plainly has the authority to decide these matters. *First*, the law of foreign relations and international obligations is quintessentially federal. *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-22 (1936) (because states never had sovereignty for foreign relations purposes, federal foreign relations

authority is plenary).[1] *Second*, it is emphatically this Court's job to say what federal law is and to enforce that law against noncomplying state officials. *E.g.*, *Marbury v. Madison*, 1 Cranch 137, 177 (1803); *Cooper v. Aaron*, 358 U.S. 1, 18-19 (1958); *see also Jones v. Meehan*, 175 U.S. 1, 32 (1899) (interpretation of treaties "the peculiar province of the judiciary"). *Third*, the Framers gave this Court original jurisdiction over "Cases affecting Ambassadors, other public Ministers and Consuls" and federal courts jurisdiction in "Cases . . . arising under . . . Treaties," U.S. Const., art. III, § 2, specifically in order to prevent disputes such as this one from creating an international incident. Petition, No. 97-1390, at 25-29. *Finally*, as a matter of international law, the judiciary engages the United States' international responsibility as fully as does the executive. IAN BROWNLIE, STATE RESPONSIBILITY, Part 1, 144 (1983) ("The judiciary and the courts are organs of the state and they generate responsibility in the same way as other categories of officials."); *Report of the Int'l Law Comm'n*, U.N. GAOR, 51st Sess., Supp. No. 10, at 126, U.N. Doc. A/51/10 (1996) (Draft Articles on State Responsibility).

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1. The breadth of federal authority in the area of international relations belies the suggestion by the United States that it is constitutionally incapable of enforcing compliance by state officials with federal law in the form of the United States's international obligations — a proposition also flatly contradicted by the very brief in which the statement is made. U.S. Br. at 15 n.3 (citing *United States v. Arlington County*, 669 F.2d 925 (4th Cir.), *cert. denied*, 459 U.S. 801 (1982), to establish "the ability of the United States to sue in order to enforce compliance with the Vienna Convention"); *see United States v. City of Glen Cove*, 322 F Supp. 149 (E.D.N.Y.), *aff'd on opinion below*, 450 F.2d 884 (2d Cir. 19) (suit by United States to enjoin municipality from assessing taxes on property owned by foreign government); *see also Dames & Moore v. Regan*, 453 U.S. 654 (1981) (affording Executive Branch great latitude in effecting resolution of international dispute); *Asakura v. Seattle*, 265 U.S. 332 (1924) (enjoining enforcement of municipal ordinance in violation of treaty); *French v. Hay*, 89 U.S. (22 Wall.) 250 (1874) (enjoining enforcement of state judgment entered in violation of federal law).

Particularly in light of the confusion in the Executive Branch, this Court should exercise its authority to decide both the original case filed by Paraguay and the case here on petition for certiorari. *First*, the Secretary of State's letter makes plain the weighty federal interest threatened by Virginia's noncompliance:

> I am particularly concerned about the possible negative consequences for the many U.S. citizens who live and travel abroad. The execution of Mr. Breard in the present circumstances could lead some countries to contend incorrectly that the U.S. does not take seriously its obligations under the [Vienna] Convention. The immediate execution of Mr. Breard in the face of the Court's April 9 action could be seen as a denial by the United States of the significance of international law and the Court's processes in its international relations and thereby limit our ability to ensure that Americans are protected when living or travelling abroad.

The Secretary's letter echoes the views expressed by Judge Stephen M. Schwebel of the United States, the President of the ICJ, when he wrote in his declaration explaining his vote in favor of the ICJ Order that

> The mutuality of interest of States in the effective observance of the obligations of the Vienna Convention on Consular Relations is the greater in the intermixed global community of today and tomorrow (and the citizens of no State have a higher interest in the observance of those obligations than the peripatetic citizens of the United States).

In light of these observations, there can be no question of both the national and international importance of the case.

Second, there should be no question that the determination of the United States' compliance or refusal to comply with the ICJ Order

should be decided by a federal authority. The United States "sp[oke] with one voice," *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 451 (1979), when it undertook the obligations contained in the United Nations Charter, the Statute of the International Court of Justice, the Vienna Convention on Consular Relations, and its Optional Protocol. Equally, it should be an organ of the whole people, not of an individual state, that determines whether the United States will comply. *See United States v. Pink*, 315 U.S. 203, 231 (1942) ("the power of a State to refuse enforcement of rights [based on State policy considerations] . . . must give way before the superior Federal policy evidenced by a treaty or international compact or agreement"); *United States v. Belmont*, 301 U.S. 304, 324, 331 (1937) ("complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states").

Third, the Court's opportunity to make that determination with the attention it deserves should not be sacrificed to the rush to meet an arbitrary execution date set by Virginia some months ago. Paraguay recognizes the right of the Commonwealth of Virginia and other competent authorities of the United States to prosecute and punish crimes within its jurisdiction, including its right to retry Mr. Breard if Paraguay prevails on its claims. Thus, the only interest at stake for Virginia if Paraguay's claims are denied is a delayed execution. By contrast, Paraguay faces the undoubted irreparable harm that an execution would cause, and the United States faces the harm to its status as a supporter of the rule of law in the world community that would result from a decision not even to consider with due deliberation the implications of Paraguay's claims and the possible consequences of disregarding of the ICJ Order.

Finally, separate and apart from the United States' interest generally in upholding the rule of law, the Court should consider the harm that would flow from a peremptory disregard *by this Court* of the ICJ Order. This Court, more than even the Secretary of State or other executive officials, will appreciate the harm to the rule of law, and to respect for judicial authority as the ultimate safeguard of the

rule of law, of a decision by the United States, after agreeing to submit disputes under the Vienna Convention to the International Court of Justice, to refuse to effect compliance with an order of that Court in a case in which the United States has appeared, participated, and had a full opportunity to present its views.

It is critical to the rule of law for which the United States has stood since its founding that the ICJ's order be respected and implemented. Given the role of the United States in promoting the rule of law in the modern world, and the role of this Court in promoting the rule of law in the United States, this Court should give effect to the ICJ Order, whether as a matter of treaty obligation or international comity.

CONCLUSION

For the foregoing reasons and for the reasons set forth in petitioners' previous submissions in No. 97-1390 and plaintiffs' previous submissions in No. 125 Original, the Court should grant (1) the petition for writ of certiorari; (2) the application and supplemental application for a stay of or injunction against the execution of Paraguay's national, Angel Francisco Breard, now scheduled for April 14, 1998; (3) the motion for leave to file an original complaint; and (4) the accompanying motion for provisional relief halting the execution.

Dated: April 14, 1998

Respectfully submitted,

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